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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 353 MISC.

In the Matter of JOHN DARMAN,
Petitioner,

against

STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BATAVIA TIMES, LAW PRINTERS.
BATAVIA, N. Y.

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now the respondents in the above entitled cause, by the Attorney General of the State of New York, and oppose the petition herein and ask that it be denied.

Statement of the Case

The petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York dated July 24, 1948, dismissing a writ of habeas corpus and remanding the relator to the custody of the Warden of Clinton Prison, Dannemora, New York. This order was duly entered and filed in the office of the County Clerk of Clinton County on July 29, 1948.

On August 12, 1948, petitioner served the Attorney General of the State of New York with a notice of appeal from the above order. While the appeal was pending and on December 26, 1948, the petitioner wrote the Attorney General stating that he had moved the Appellate Division, Third Judicial Department, for an extension of time in which to perfect his appeal. That Court on January 12, 1949 denied his application on the ground that the papers submitted did not disclose any matter appealable to that court.

Apparently the petitioner then moved the New York State Court of Appeals for permission to appeal to that court. The respondents had no notice of this motion and did not therefore oppose. On December 29, 1949, the Court of Appeals dismissed petitioner's motion for leave to appeal "on the ground that the order appealed from is not a final determination and no appeal can be taken therefrom to this court".

It is noteworthy that the petitioner did not serve notice upon the respondents for either (1) motion to the Appellate Division for an extension of time; (2) motion to the Court of Appeals for leave to appeal to that court; (3) application for certiorari to this court.

Facts

Darman was convicted by plea of guilty in the Kings County Court of the crime of attempted rape, second degree and was sentenced by that court on October 30, 1942, as a fourth felony offender, to a term of 20 years to life. No appeal was taken from the judgment of conviction.

In his application for the writ of habeas corpus, which is the subject for review, petitioner charged that he had been

placed in double jeopardy; that he had been forced to sign a confession and that he had plead guilty to the crime of attempted rape, second degree, because of his attorney's fraudulent promise that he would be given a suspended sentence. The Court hearing the writ, after due deliberation and without opinion, dismissed the writ and remanded the relator to the custody of the Warden.

POINT I

Petitioner did not exhaust his remedies in the state courts and there has been no decision on the merits by the highest court of the state in which a decision could be had.

Section 588 of the Civil Practice Act of New York provides that an appeal to the Court of Appeals as of right lies only from a judgment or order of the Appellate Division, provided that the judgment finally determines an action or the order finally determines a special proceeding, which action or proceeding was originally commenced in the Supreme Court. This requirement that an appeal as of right lies only from a judgment or order of the Appellate Division, which finally determines an action or special proceeding, is similar to the limitation on the Court of Appeals' jurisdiction as set forth in Article 6, Section 7 of the Constitution of the State of New York. That section provides:

> "§ 7. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered, * * * ."

Subdivision 5 of the same section provides that appeals to the Court of Appeals may be taken by permission from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding. In granting permission for leave to appeal to the Court of Appeals, it is absolutely essential that the decision of the Appellate Division of the Supreme Court *finally* determines the action or special proceeding. In the instant case there was no final determination by the Appellate Division, Third Judicial Department, as that court did not pass upon the merits but merely denied petitioner's motion for leave to appeal as a poor person and for the granting of additional time in which to perfect his appeal. Since there was no final determination by the Appellate Division, petitioner's motion for leave to appeal to the Court of Appeals, addressed to that court, was properly denied.

An identical question concerning the jurisdiction of this Court was presented in *Morris Plan Industrial Bank of New York* v. *Graves, et al.* (1941), 314 U. S. 572. This Court's decision was as follows:

> "*Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a final judgment of the highest court of the State on the constitutional question presented. The Chief Justice took no part in this decision."

In that case, the appellant, in addition to moving the Appellate Division and the Court of Appeals for leave to appeal, which motions were denied, had served notice of appeal to the Court of Appeals as of right from the final order of the Appellate Division. After the dismissal of the appeal to this Court, the appeal as of right to the Court of Appeals was brought on for argument and resulted in a decision affirming the order appealed from (288 N. Y.,

Mem. p. 91). Upon appeal to this Court, the appeal was dismissed for the want of a substantial Federal question (317 U. S. 591).

In the instant case no appeal has been taken to the Court of Appeals, which did not attempt to pass upon the merits but merely denied a motion for leave to appeal on the ground that there had been no final determination by the lower court.

POINT II

As a matter of law, petitioner is not entitled to a writ of certiorari.

Section 1257 of Title 28, U.S.C.A. provides that final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

"• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held on authority exercised under, the United States."

In the instant case the petitioner prays for a writ of certiorari to review an order of the Supreme Court of the State of New York which is not the highest court of that State and is therefore not reviewable under the requirement set forth in Section 1257.

The petitioner has not been foreclosed from securing a review of the dismissal of the writ by an appellate court.

Section 1274 of the New York Civil Practice Act provides that an appeal may be taken as of right from a final order made upon the return of a writ of habeas corpus, to dismiss the writ. Such an appeal has been taken by the petitioner and is now pending.

CONCLUSION

It is respectfully submitted that the petition should be denied.

Dated: Albany, N. Y., April , 1950.

Respectfully submitted,

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